APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED MARCH 29, 2000

ALAN M. HOWARD, an individual; R. BORIS GREENBERG, an individual; KATHRYN PARAVENTI, an individual; MEHRDAD ETEMAD, an individual; on behalf of themselves and on behalf of all others similarly situated, Plaintiffs-Appellants, v. AMERICA ONLINE INC., a Corp.; JAMES V. KIMSEY, an individual; STEPHEN M. CASE, an individual; LENNERT J. LEADER, an individual; DOE, individuals 1-50; ROE, entities 51-100, inclusive, Defendants-Appellees.

No. 98-56138

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

208 F.3d 741

February 14, 2000, Argued and Submitted, Pasadena, California

Filed March 29, 2000

PRIOR HISTORY:

Appeal from the United States District Court for the Central District of California. D.C. No. CV-97-01642-AAH. A. Andrew Hauk, District Judge, Presiding.

COUNSEL:

Alec B. Wisner and H. Scott Leviant, Stanbury & Fishelman, Inc., Los Angeles, California, for the plaintiffs-appellants.

Miles N. Ruthberg, Latham & Watkins, Los Angeles, California, for the defendants-appellees.

JUDGES:

Before: James R. Browning, Alfred T. Goodwin and Robert R. Beezer, Circuit Judges. Opinion by Judge Beezer.

OPINION BY:

Robert R. Beezer

OPINION:

BEEZER, Circuit Judge:

Plaintiffs Alan M. Howard, R. Boris Greenberg, Kathryn Paraventi and Merhdad Etemad ("Plaintiffs") sued America Online, Inc., James V. Kimsey, Stephen M. Case, Lennert J. Leader and 100 "Doe" and "Roe" defendants (collectively "AOL") for: violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § § 1962*(c), 1962(d); violations of the Communications Act of 1934, *47 U.S.C. § § 151*-613; false advertising in violation of California Business and Professional Code § § 17500-17509; fraud and deceit; negligence; unfair business practices in violation of California Business and Professional Code § § 17200-17210; and declaratory and injunctive relief. The district court granted AOL's motion to dismiss. We have jurisdiction pursuant to *28 U.S.C. § 1291*, and we affirm.

I

Plaintiffs are subscribers of AOL, an "Internet (or information) service provider" ("ISP") that provides Internet access, electronic mail ("e-mail"), online conferencing and information directories, entertainment, software, electronic publications and original programming. *See generally 47 U.S.C. § 230*(f)(2) (West Supp. 1999) (defining interactive computer service). The individual defendants are officers who, according to Plaintiffs, managed AOL.

On March 13, 1997, Plaintiffs filed their original complaint, which claimed that AOL engaged in

fraudulent billing practices, securities fraud, fraud against a packaging supplier, fraudulent promotion of its "flat-fee" program, improper charges to subscribers and violations of its duty to protect subscribers' privacy rights and copyrights. The district court granted AOL's motion to dismiss, with leave to amend, on September 22, 1997.

Plaintiffs filed their first amended complaint ("complaint") on October 22, 1997. Although Plaintiffs moved for class certification under Federal Rule of Civil Procedure 23(b), the district court orally refused to grant the motion. AOL moved for dismissal, which the district court granted with prejudice on May 19, 1998. Plaintiffs appeal.

II

"A dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is reviewed *de novo*. Review is limited to the contents of the complaint. All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Chang v. Chen, 80 F.3d 1293, 1296 (9th Cir. 1996)* (internal citations omitted).

The district court held that Plaintiffs failed to state a claim for violations of RICO. A violation under section 1962(c) requires proof of: "1) conduct 2) of an enterprise 3) through a pattern 4) of racketeering activity." *Sedima S.P.R.L. v. Imrex Corp., 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985)* (internal note omitted). At issue is whether Plaintiffs properly alleged a pattern of racketeering activity.

A pattern is defined as "at least two acts of racketeering activity" within ten years of each other. *18 U.S.C. § 1961*(5). Two acts are necessary, but not sufficient, for finding a violation. *See H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 238, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989).* "The term 'pattern' itself requires the showing of a relationship between the predicates and of the threat of continuing activity." *Id. at 239* (internal citation and quotation marks omitted).

A

The district court dismissed Plaintiffs' fraudulent billing claims, based on mail and wire fraud, because they had been settled in an earlier action and could not constitute predicate acts under RICO. Plaintiffs assert that they are not barred from using these claims as part of a pattern of racketeering activity. We disagree.

On March 18, 1997, the California Superior Court approved a settlement between AOL and a class of its subscribers. *See Hagen v. America Online, Inc.,* No. 971047 (Cal. Super. Ct. Mar. 18, 1997). The subscribers sued AOL for unfair business practices, fraud, breach of contract, unjust enrichment and negligent misrepresentation. The complaint alleged that AOL: failed to disclose connection and disconnection times; rounded up billing times; used misleading advertising regarding its hourly rate; unfairly calculated its service charge; improperly charged for downloading, delays, and time in "free areas"; failed to refund charges after cancellation; and made unauthorized withdrawals from checking accounts.

The *Hagen* class was defined as "all persons in the United States who at any time during the Class Period [July 14, 1991 to March 31, 1996] were subscribers of America Online Services." The settlement "permanently barred and enjoined" the class members from "asserting . . . against [AOL] any claims, rights, . . . of any nature, known or unknown, . . . which are alleged in the Amended Complaint, or which could or might have been alleged in the Amended Complaint and arise out of or are related to the matters referred to in the Amended Complaint."

In this case, Plaintiffs claimed violations of RICO, the Communications Act and California law proscribing false advertising, fraud and deceit, negligence and unfair business practices. The complaint stated that AOL: used both mail and wire fraud to improperly bill subscribers from 1992 to 1995; fraudulently manipulated its stock in 1995 and 1996; improperly billed for time in "free areas" from 1994 to 1996; improperly delayed cancellations from 1994 to "at least March 31, 1996"; made unauthorized withdrawals from subscribers' accounts; improperly used billing information and distributed false advertising related to its free trial program; made misrepresentations to PTP, a packaging company; and falsely promoted its "flat-fee" program. The proposed class included anyone who subscribed to AOL from March 13, 1993 to March 13, 1997; the complaint did not specify when Plaintiffs subscribed to AOL.

The district court found that Plaintiffs "clearly fall within the Settlement Class . . . . [They] have not presented any argument to the contrary; nor do they

claim to have opted out of the *Hagen* settlement class . . . . Plaintiffs' attempt to repackage the claims asserted and settled in *Hagen* as predicate acts under RICO is therefore barred."

"Where a judicially approved settlement is under consideration, a federal court may consequently find guidance from general state law on the preclusive force of settlement judgments." Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 375, 134 L. Ed. 2d 6, 116 S. Ct. 873 (1996). In California, interpretation of a settlement release is governed by contract principles. See General Motors Corp. v. Superior Court, 12 Cal. App. 4th 435, 15 Cal. Rptr. 2d 622, 625 (Cal. Ct. App. 1993).

The *Hagen* settlement unequivocally bars claims that "arise out of or are related to the matters referred to" in the complaint. Plaintiffs' RICO claims cite the identical billing allegations as *Hagen*. The settlement bars the use of these claims by the same parties. *See 15 Cal. Rptr. 2d at 626; see also Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1287 (9th Cir. 1992)* ("[A] federal court may release . . . a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented *and might not have been presentable in the class action.*") (emphasis in original) (internal quotation marks omitted).

Plaintiffs counter that the *Hagen* settlement does not apply because one of the Plaintiffs, Boris Greenberg, did not subscribe to AOL until 1997. This contention was not raised before the district court. "As a general rule, we will not consider an issue raised for

the first time on appeal . . . ." *Bolker v. Commissioner, 760 F.2d 1039, 1042 (9th Cir. 1985).* Even if we assume that Greenberg was not a subscriber until 1997, he was not damaged by AOL's actions prior to that time and cannot cite such allegations as RICO predicates. *See Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 366 n.4 (9th Cir. 1992).*

The district court also relied on claim preclusion as a bar to considering Plaintiffs' billing allegations as predicate acts. Plaintiffs contend that the RICO pattern was not completed at the time of the *Hagen* settlement, and that the acts at issue in *Hagen* can therefore be considered predicates. This argument is meritless.

Claim preclusion in federal court can be based on a state court settlement. *See Matsushita, 516 U.S. at 375.* The preclusive effect of a state court judgment in federal court is based on state preclusion law. *See Eichman v. Fotomat Corp., 759 F.2d 1434, 1437 (9th Cir. 1985).* "Under California law, a final judgment on the merits will preclude further litigation on the same cause of action." *Pension Trust Fund for Operating Eng'rs v. Triple A Mach. Shop, Inc., 942 F.2d 1457, 1460 (9th Cir. 1991)* (citing *Slater v. Blackwood, 15 Cal. 3d 791, 126 Cal. Rptr. 225, 226, 543 P.2d 593 (Cal. 1975)* (in bank)). A judicially approved settlement agreement is considered a final judgment on the merits. *See Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n, 60 Cal. App. 4th 1053, 71 Cal. Rptr. 2d 77, 84 (Cal. Ct. App. 1998).*

There is no support for Plaintiffs' contention that the *Hagen* class could not claim RICO violations because the requisite pattern had not yet developed.

Plaintiffs are part of the *Hagen* class and asserted identical billing claims that occurred during the same time period. *Cf. Gamble v. General Foods Corp., 229 Cal. App. 3d 893, 280 Cal. Rptr. 457, 460 (Cal. Ct. App. 1991)* ("Two actions constitute a single cause of action if they both affect the same primary right."). The *Hagen* class could have claimed a RICO violation based on the billing fraud. Plaintiffs were part of that class and are barred from subsequently bringing a claim that they could have made earlier. *See Pedrina v. Chun, 97 F.3d 1296, 1301 (9th Cir. 1996)* (applying claim preclusion because predicate acts could have been raised in earlier state court action); *Eichman, 759 F.2d at 1439* (holding that settlement agreement "does not preclude the pendent state claims in [the subsequent action] insofar as the latter alleges wrongful conduct occurring after the settlement date of the former"). *But see County of Cook v. MidCon Corp., 773 F.2d 892, 908 (7th Cir. 1985)* (stating that "where . . . only some aspects of an allegedly fraudulent scheme were at issue in the prior suit, a subsequent RICO action based on the entire scheme *presumably* would not be barred") (emphasis added).

Plaintiffs argue that the billing claims, even if inadmissable as predicate acts, can be used as evidence of a racketeering pattern because the pattern "forms the basis of the [RICO] violation, not the underlying acts themselves." To show a pattern under RICO, Plaintiffs must prove that there are a sufficient number of predicate acts "indictable" as mail or wire fraud. *See 18 U.S.C. § § 1961*(1)(B), 1962(c). Citing acts as a part of a RICO pattern, without proving that they are indictable, is not sufficient. *See Sigmond v. Brown, 828 F.2d 8, 9 (9th*

Cir. 1987) (holding that dismissal of RICO claim was appropriate where plaintiff did not present evidence that defendant committed mail fraud). Plaintiffs failed to allege a pattern of indictable billing claims.

We hold that the district court properly refused to consider the billing claims as RICO predicates.

B

Plaintiffs claimed that part of the RICO pattern was the inducement of PTP, a packaging supplier, to expand its operations based on AOL's misrepresentations about its shipping needs. The district court refused to consider this claim as a RICO predicate because the misrepresentations were not related to the other predicates, and Plaintiffs lacked standing to bring a claim for injuries to PTP. Because the district court properly held that this claim was unrelated to the other alleged predicates, we do not address the standing issue.

Establishment of a pattern "requires the showing of a relationship between the predicates and of the threat of continuing activity." *H.J., 492 U.S. at 239* (internal citation and quotation marks omitted). "Related" conduct "embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id. at 240* (internal quotation marks omitted).

We have not decided whether acts are "related" when they share only the same participants. Plaintiffs cite to the Second Circuit's statement that "the involvement of similar participants is sufficient to demonstrate a relationship among the predicate acts." *United States v. Simmons, 923 F.2d 934, 951 (2d Cir. 1991).* In spite of *Simmons,* the Second Circuit subsequently held in *Schlaifer Nance & Co. v. Estate of Warhol, 119 F.3d 91, 97 (2d Cir. 1997),* that, based on the facts of that case, predicate acts committed by the same participant were not related. The Sixth Circuit has also held that claiming identical participants alone is insufficient to establish relatedness. *See Vild v. Visconsi, 956 F.2d 560, 566-68 (6th Cir. 1992)* (holding that acts by same defendants against plaintiff are unrelated to acts against third parties); *cf. Hartz v. Friedman, 919 F.2d 469, 474 (7th Cir. 1990)* (holding that acts against the same victims are insufficient to establish relatedness).

The facts here illustrate why merely having the same participants is insufficient to establish relatedness. The purpose, result, victim and method of the PTP misrepresentations are strikingly different from the wire and mail fraud, stock manipulation and flat-fee advertising claims. To hold that Plaintiffs have established relatedness solely because they implicate the same participants makes that requirement virtually meaningless.

We affirm the district court's holding that the PTP misrepresentations are not related to the other claimed predicate acts and cannot be considered part of Plaintiffs' RICO claim.

C

Plaintiffs claimed that AOL committed securities fraud as part of a pattern of racketeering activity. In particular, Plaintiffs asserted that AOL misrepresented revenues, profits and number of subscribers; used improper accounting practices; and illegally sold stock at a profit. The district court held that Plaintiffs cannot use these claims to establish a RICO violation because of a statutory bar and because the claims lack relation to the other predicates. We agree.

The Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, § 107, 109 Stat. 737, 758 (Dec. 22, 1995), amended RICO so that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962." *18 U.S.C. § 1964*(c) (Supp. II 1996). Plaintiffs argue that this amendment does not apply because they lack standing to bring securities fraud claims against AOL.

Section 1964(c) proscribes using as a predicate "any *conduct* that would have been actionable as [securities] fraud." (Emphasis added). Plaintiffs do not dispute that their securities fraud claims could be brought by a plaintiff with proper standing. The claims implicate "conduct that would have been actionable as [securities] fraud" and section 1964(c) bars their use as RICO predicates.

The district court held also that the securities fraud claims were not related to the other predicate acts. As noted, acts that share only the same

participants are insufficient to establish relatedness. The securities fraud claims have a different purpose, result, victim and method than the billing fraud, misrepresentations against PTP and the flat-fee advertising claims. Plaintiffs failed to show that the securities fraud claims are related to the other predicate acts.

We hold that Plaintiffs' securities fraud claims cannot be used to establish a RICO violation.

D

In October 1996, AOL started advertising its flat-fee program, which charged subscribers a monthly fee for unlimited Internet access, rather than the previous time charge. This change resulted in an overload of AOL's network, and prevented or delayed many subscribers' ability to access the Internet. Plaintiffs claimed that AOL, although aware that it could not process the volume, distributed a "flurry" of false and misleading advertising to promote its new flat-free program. We affirm the district court's holding that, assuming that the predicate acts were sufficiently pleaded, this claim failed to establish a RICO pattern.

Demonstrating a pattern "requires the showing of a relationship between the predicates and of the threat of continuing activity." *H.J., 492 U.S. at 239* (internal citation and quotation marks omitted). The district court properly concluded that there was no threat of continuing activity.

To satisfy the continuity requirement, Plaintiffs must prove either "a series of related predicates extending over a substantial period of time[, i.e., closed-ended continuity]," *H.J., 492 U.S. at 242,* or "past conduct that by its nature projects into the future with a threat of repetition[, i.e., open-ended continuity]," *id. at 241.* Plaintiffs argue that they met this test by alleging that AOL began its false advertising in October 1996 and continues to do so as part of its regular way of conducting business.

"Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the closed-ended continuity] requirement." *Id. at 242.* Activity that lasts only a few months is not sufficiently continuous. *See Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1528 (9th Cir. 1995)* (holding also that there is no strict one-year rule); *Wollersheim, 971 F.2d at 366-67.*

The complaint stated that AOL's "improper activities continue even at the present, in the form of misleading advertisements for 'unlimited' access." This claim was not supported by any facts. Plaintiffs provided some specifics for advertisements made before February 1997, but gave no factual support for acts after that date. Because conclusory allegations are insufficient to preclude dismissal, *see Associated Gen. Contractors of Am. v. Metropolitan Water Dist., 159 F.3d 1178, 1181 (9th Cir. 1998),* we hold that Plaintiffs failed to demonstrate closed-ended continuity.

"Open-ended continuity is shown by 'past conduct that by its nature projects into the future with a threat of repetition,' i.e., predicate acts that specifically

threaten repetition or that become a 'regular way of doing business.'" *Allwaste, 65 F.3d at 1528* (quoting *H.J., 492 U.S. at 241, 242)*. The district court held that Plaintiffs failed to state facts that reasonably imply that AOL would continue its false advertising past February 1997.

Plaintiffs tell us that AOL's regular way of doing business was to mislead the public. The complaint stated that AOL "engaged in repeated fraudulent schemes as an ongoing course of business." This general statement refers to *all* allegations of improper activity in the complaint, not just the false advertising. There is evidence that AOL's ability to process the volume was improving and, pursuant to a consent decree with the Federal Communications Commission ("FCC"), that AOL would better explain its program. Plaintiffs present no facts indicating that misleading advertising would continue into the future, particularly given that the problems stemmed from a one-time change in pricing policy. *See, e.g., Durning v. Citibank, Int'l, 990 F.2d 1133, 1139 (9th Cir. 1993)* (holding that predicate acts arising from a single event - the dissemination of a misleading document - did not satisfy the open-ended continuity requirement). The complaint does not sufficiently allege that AOL engaged in an open-ended pattern of racketeering activity.

We affirm the district court's holding that Plaintiffs' false advertising claims failed to establish a RICO pattern.

E

Plaintiffs challenge the district court's holding that the complaint did not satisfy Federal Rule of Civil Procedure 9(b) because the claims did not show each defendants' connection to the fraudulent flat-fee advertisements. *See 18 U.S.C. § § 1341* (wire fraud), 1343 (mail fraud). Because the district court properly held that these claims did not establish a RICO pattern, we decline to address this issue.

F

Plaintiffs contend that the district court erroneously dismissed their claim that AOL engaged in a conspiracy in violation of section 1962(d). *See 18 U.S.C. § 1962*(d) ("It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."). The district court concluded that Plaintiffs failed to state that the defendants were part of a RICO enterprise, agreed to violate the substantive provisions of RICO or agreed to participate in a RICO conspiracy. In particular, the district court held that the failure to adequately plead a substantive violation of RICO precludes a claim for conspiracy. We agree.

"A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor." *Salinas v. United States, 522 U.S. 52, 65, 139 L. Ed. 2d 352, 118 S. Ct. 469 (1997).* A defendant must also have been "aware of the

essential nature and scope of the enterprise and intended to participate in it." *Baumer v. Pachl, 8 F.3d 1341, 1346 (9th Cir. 1993)* (internal quotation marks omitted). To establish a violation of section 1962(d), Plaintiffs must allege either an agreement that is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses. *See id.*

Plaintiffs argue that the district court erroneously relied on our holding in *Wollersheim*. *See 971 F.2d at 367 n.8* ("Because we find that [the plaintiff] has failed to allege the requisite substantive elements of RICO, the conspiracy cause of action cannot stand."). If a substantive violation is properly pleaded, a conspiracy claim may survive a factfinder's conclusion that there is not sufficient evidence to prove the violation. *See Neibel v. Trans World Assurance Co., 108 F.3d 1123, 1127 (9th Cir. 1997)* (analyzing *Wollersheim*). "If the section 1962(c) claim does not state an action upon which relief could *ever* be granted, regardless of the evidence, then the section 1962(d) claim cannot be entertained." *Id.* (emphasis in original) (citing *Wollersheim, 971 F.2d at 367 n.8).*

The district court granted AOL's Rule 12(b)(6) motion and held that Plaintiffs failed to state a claim upon which relief can be granted. Plaintiffs cannot claim that a conspiracy to violate RICO existed if they do not adequately plead a substantive violation of RICO. *See id.* Even if Plaintiffs properly claimed that the defendants agreed to be a part of an enterprise, the failure to allege substantive violations precludes their claim that there was a conspiracy to violate RICO.

We affirm the district court's dismissal of Plaintiffs' conspiracy claim.

III

Plaintiffs claimed that AOL violated the Communications Act, *47 U.S.C. § § 201,* 202(b), 551, by making unreasonable charges, practices, classifications or regulations; by unreasonably prejudicing some subscribers by favoring others; and by failing to protect subscriber privacy. The district court properly held that AOL is not a common carrier and, therefore, did not violate the Communications Act. *See, e.g., 47 U.S.C. § § 201,* 202(b) (regulating only common carriers).

"The term 'common carrier' . . . means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign transmission of energy . . . ." *47 U.S.C. § 153*(10) (Supp. III 1997). "Due to the circularity of the definition, resort must be had to court and agency pronouncements to ascertain the term's meaning." *FCC v. Midwest Video Corp., 440 U.S. 689, 701 n.10, 59 L. Ed. 2d 692, 99 S. Ct. 1435 (1979).*

The Supreme Court has defined a common carrier as one that "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing." *Id. at 701* (alteration in original) (quoting *In re Industrial Radiolocation Serv., 5 F.C.C.2d 197, 202 (1966)* (report and order)). "A common carrier does not 'make individualized decisions, in particular

cases, whether and on what terms to deal.'" *Id.* (quoting *National Ass'n of Regulatory Utility Comm'rs v. FCC, 173 U.S. App. D.C. 413, 525 F.2d 630, 641 (D.C. Cir. 1976)* ("*NARUC I*") (describing the "quasi-public" nature of common carriers)).

Congress created the FCC to enforce the Communications Act. *See 47 U.S.C. § 151* (Supp. III 1997). The Supreme Court's "opinions have repeatedly emphasized that the [FCC's] judgment regarding how the public interest is best served is entitled to substantial judicial deference." *FCC v. WNCN Listeners Guild, 450 U.S. 582, 596, 67 L. Ed. 2d 521, 101 S. Ct. 1266 (1981).*

Federal regulations describe a common carrier as "any person engaged in rendering communication service for hire to the public." 47 C.F.R. § 21.2. The FCC has declared that, under the Communications Act, "'carriers' is synonymous with the term 'common carriers,' which does not include ISPs." *In re Non-Accounting Safeguards, 11 FCC Rcd 21905, 22034 (1996)* (proposed rule) (citing *47 U.S.C. § 153*(10)). This opinion stems from the FCC's distinction between "basic" and "enhanced" services.

The FCC has concluded that common carriers offer "basic" information transport rather than "enhanced" services, which implicate the transfer and storage of information that subscribers can access. *See In re Second Computer Inquiry, 77 F.C.C.2d 384, 417-23 (1980)* (final decision); 47 C.F.R. 64.702(a) ("*Enhanced service* shall refer to services . . . which employ computer processing applications that act on the

format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under Title II of the Act."). Enhanced services "include[ ] access to the Internet and other interactive computer networks." *In re Access Charge Reform, 12 FCC Rcd 15982, 16131 n.498 (1997)* (proposed rule). The FCC has consistently stated that ISPs are not common carriers. *See In re Federal-State Joint Board on Universal Service, 12 FCC Rcd 87, 479 (1996)* (recommended decision) ("[Enhanced Service Providers ("ESPs")] note that the Commission has traditionally defined on-line and Internet services as enhanced services and has not regulated [ESPs] as common carriers . . . .").

The FCC's construction of "common carrier" is a reasonable interpretation of an ambiguous statute. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). The Telecommunications Act of 1996, which amended the Communications Act, further supports the FCC. Congress provided, in a section prohibiting obscene or harassing communications, that "nothing in this section shall be construed to treat interactive computer services as common carriers." 47 U.S.C. § 223(e)(6) (Supp. III 1997). "The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." Sorenson v. Secretary of Treasury, 475 U.S. 851, 860, 89 L. Ed. 2d 855, 106 S. Ct. 1600 (1986) (internal quotation marks omitted). Congress also stated that its aim is "to preserve the

vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2) (West Supp. 1999). The FCC's interpretation meets this policy goal.

Plaintiffs argue that AOL should be regulated in part as a common carrier. The D.C. Circuit stated that "since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others." *National Ass'n of Regulatory Utility Comm'rs v. FCC, 174 U.S. App. D.C. 374, 533 F.2d 601, 608 (D.C. Cir. 1976)* ("*NARUC II*"); *see also McDonnell Douglas Corp. v. General Tel. Co., 594 F.2d 720, 725 n.3 (9th Cir. 1979)* (citing *NARUC II*). The facts here are distinguishable.

NARUC II involved the objection of cable operators, which previously had not been classified as common carriers, to the FCC's assertion of preemption over leased access two-way channels. *See 533 F.2d at 605*. These channels used a different bandwidth than the normal one-way channels and constituted a distinct mode of cable service. *See id.* at 605-06. Conversely, e-mail and "chat rooms," which Plaintiffs cite as common carrier activity, are integral to AOL's services.

"The service that the Internet access providers offer to members of the public is Internet access . . . ." *In re Federal-State Joint Board on Universal Service, 13 FCC Rcd 11501, 11539 (1998)* (report to Congress) (contrasting services of application providers such as Juno, which offered only e-mail). The FCC has stated

that hybrid services like those offered by AOL "are information[, i.e., enhanced] services, and are not telecommunication services." *Id. at 11529.* This conclusion is reasonable because e-mail fits the definition of an enhanced service - the message is stored by AOL and is accessed by subscribers; AOL does not act as a mere conduit for information. *See id. at 11539.* Even chat rooms, where subscribers can exchange messages in "real-time," are under AOL's control and may be reformatted or edited. *See id. at 11537-38.* Plaintiffs have failed to show that AOL offers discrete basic services that should be regulated differently than its enhanced services. *Accord America Online, Inc. v. GreatDeals.Net, 49 F. Supp. 2d 851, 855-57 (E.D. Va. 1999)* (holding that AOL is not a common carrier); *CompuServe, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1025 (S.D. Ohio 1997)* ("[ISPs] have been held not to be common carriers.") (citing *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1369 n.12 (N.D. Cal. 1995)* (holding, in copyright suit, that ISP was not a common carrier)).

We hold that AOL is not a common carrier under the Communications Act.

IV

Plaintiffs sought a declaration that AOL violated Plaintiffs' constitutional rights and improperly asserted ownership of Plaintiffs' copyrights. The district court dismissed these counts in part because Plaintiffs failed to state claims for relief under federal law, thereby depriving the court of jurisdiction. We agree.

A request for declaratory judgment does not provide an independent basis for federal jurisdiction. *See Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 672, 94 L. Ed. 1194, 70 S. Ct. 876 (1950).* The district court concluded that Plaintiffs' constitutional claims lacked the necessary state action and that their copyright allegations failed to state a claim under federal copyright law.

Plaintiffs argue that their claims under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments do not require state action. *Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965),* which Plaintiffs cite in support of their argument, expressly noted that the Fourth and Fifth Amendments protect "against all *governmental* invasions." *Id. at 484* (emphasis added). The "general right to privacy, . . . Fourteenth Amendment liberty[,] and the other elements of those more general rights are obviously *not* protected against private infringement." *Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 278, 122 L. Ed. 2d 34, 113 S. Ct. 753 (1993)* (emphasis in original) (internal citations omitted) (holding that only rights under the Thirteenth Amendment protect against private action); *see also United States v. Young, 153 F.3d 1079, 1080 (9th Cir. 1998)* ("The Fourth Amendment limits searches conducted by the government, not by a private party, unless the private party acts as an 'instrument or agent' of the government."); *Rank v. Nimmo, 677 F.2d 692, 701 (9th Cir. 1982)* ("The Due Process Clause of the Fifth Amendment applies to actions of the federal government and not to individual activities of private actors[, unless] . . . the action of the latter may be fairly

treated as that of the [government] itself.") (internal quotation marks omitted).

Plaintiffs counter that AOL is a "quasi-public utility" that "involves a public trust." This claim is insufficient to hold that AOL is an "instrument or agent" of the government. There is nothing in the record that supports the contention that AOL should be considered a state actor. *Accord Thomas v. Network Solutions, Inc., 176 F.3d 500, 511 (D.C. Cir. 1999)* (holding that company in charge of Internet domain names is a private actor); *Cyber Promotions, Inc. v. American Online, Inc., 948 F. Supp. 436, 443-44 (E.D. Pa. 1996)* (holding that AOL is not a state actor). We conclude that Plaintiffs did not sufficiently plead constitutional claims against AOL; thus, these claims cannot support federal jurisdiction over the request for declaratory and injunctive relief.

Plaintiffs asserted that federal jurisdiction was based also on violations of federal copyright law. Federal jurisdiction under the Copyright Act, *17 U.S.C. § § 101-810*, exists:

> if and only if the complaint is for a remedy expressly granted by the Act, e.g., a suit for infringement or for the statutory royalties for record reproduction . . . or asserts a claim requiring construction of the Act, . . . or, at the very least and perhaps more doubtfully, presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim.

Topolos v. Caldewey, 698 F.2d 991, 993 (9th Cir. 1983) (alterations in original) (quoting *T.B. Harms Co. v. Eliscu, 339 F.2d 823, 828 (2d Cir. 1964)).*

The district court held that Plaintiffs alleged that AOL improperly transferred copyright ownership, which was insufficient to support federal jurisdiction. This conclusion gives the complaint too much credit. Although Plaintiffs stated that AOL transferred ownership in violation of *17 U.S.C. § 204,* and continued to "improperly take[ ]" copyrighted material, the complaint makes clear that ownership is not at issue. Rather, Plaintiffs claimed that AOL asserted a *license* "without proper notice, adequate compensation and bilateral negotiation." Indeed, Plaintiffs quote the AOL agreement, which expressly refers to a "license to use" the material.

Plaintiffs argue that ITSI T.V. Prods., Inc. v. California Auth. of Racing Fairs, 785 F. Supp. 854, 862 (E.D. Cal. 1992), rev'd in part sub nom. ITSI T.V. Prods., Inc. v. Agricultural Ass'ns, 3 F.3d 1289 (9th Cir. 1993), supports the proposition that there is federal jurisdiction over AOL's vicarious liability for the infringement of copyrights. ITSI is inapposite; Plaintiffs did not cite any acts of infringement, either with or without AOL's involvement.

Plaintiffs claimed merely that AOL enacted an improper license agreement. The ownership of copyrights is not at issue, and Plaintiffs have not claimed any infringement, or requested relief, under the Copyright Act. The copyright claims do not support

federal jurisdiction. *See Topolos, 698 F.2d at 993-94; Dolch v. United Cal. Bank, 702 F.2d 178, 180-81 (9th Cir. 1983).*

We hold that Plaintiffs' constitutional and copyright claims are insufficient bases for federal jurisdiction.

V

Plaintiffs do not challenge the district court's holding that, given the lack of jurisdiction over the federal claims, dismissal of the state law claims was proper. "When federal claims are dismissed before trial . . . pendent state claims also should be dismissed." *Wollersheim, 971 F.2d at 367-68* (alteration in original) (quoting *Jones v. Community Redevelopment Agency, 733 F.2d 646, 651 (9th Cir. 1984)).*

We affirm the dismissal of the state law claims.

AFFIRMED.

APPENDIX B – SELECTED PORTIONS OF FEDERAL COMMUNICATIONS ACT OF 1934, 47 U.S.C. § 151 et seq.

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
GENERAL PROVISIONS

47 USCS § 151 (1998)

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act [47 USCS §§ 151 et seq.].

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
GENERAL PROVISIONS

47 USCS § 152 (1998)

§ 152. Application of chapter

(a) The provisions of this Act [47 USCS §§ 151 et seq.] shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in [the Philippine Islands or] the Canal Zone, or to wire or radio communication or transmission wholly within [the Philippine Islands or] the Canal Zone. The provisions of this Act [47 USCS §§ 151 et seq.] shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in title VI [47 USCS §§ 521 et seq.].

(b) Except as provided in sections 223 through 227 [47 USCS §§ 223-227], inclusive, and section 332 [47 USCS § 332], and subject to the provisions of section 301 [47 USCS § 301] and Title VI [47 USCS §§ 521 et seq.], nothing in this Act [47 USCS §§ 151 et seq.] shall be

construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 through 205 of this Act, both inclusive [47 USCS §§ 201-205], shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION GENERAL PROVISIONS

47 USCS § 153 (1998)

§ 153. Definitions

For the purposes of this Act [47 USCS §§ 151 et seq.], unless the context otherwise requires—

(1) Affiliate. The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.

. . .

(5) Broadcast station. The term "broadcast station", "broadcasting station", or "radio broadcast station" means a radio station equipped to engage in broadcasting as herein defined.

(6) Broadcasting. The term "broadcasting" means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.

(7) Cable service. The term "cable service" has the meaning given such term in section 602.

(8) Cable system. The term "cable system" has the meaning given such term in section 602.

(9) Chain broadcasting. The term "chain broadcasting" means simultaneous broadcasting of an identical program by two or more connected stations.

(10) Common carrier. The term "common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act [47 USCS §§ 151 et seq.]; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

(11) Connecting carrier. The term "connecting carrier" means a carrier described in clauses (2), (3), or (4) of section 2(b) [47 USCS § 152(b)].

. . .

(13) Corporation. The term "corporation" includes any corporation, joint-stock company, or association.

(14) Customer premises equipment. The term "customer premises equipment" means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.

(15) Dialing parity. The term "dialing parity" means that a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation from among 2 or more telecommunications services providers (including such local exchange carrier).

(16) Exchange access. The term "exchange access" means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.

(17) Foreign communication. The term "foreign communication" or "foreign transmission" means communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States.

. . .

(20) Information service. The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

(21) InterLATA service. The term "interLATA service" means telecommunications between a point located in a local access and transport area and a point located outside such area.

(22) Interstate communication. The term "interstate communication" or "interstate transmission" means communication or transmission (A) from any State, Territory, or possession of the United States (other than the [Philippine Islands and] the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than [the Philippine Islands and] the Canal Zone), or the District of Columbia, (B) from or to the United States to or from [the Philippine Islands or] the Canal Zone, insofar as such communication or transmission takes place within the United States, or (C) between points within the United States but through a foreign country; but shall not, with respect to the provisions of title II of this Act [47 USCS §§ 201 et seq.] (other than section 223 thereof [47 USCS § 223]) include wire or rādio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

. . .

(25) Local access and transport area. The term "local access and transport area" or "LATA" means a contiguous geographic area—

(A) established before the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996] by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or

(B) established or modified by a Bell operating company after such date of enactment and approved by the Commission.

(26) Local exchange carrier. The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) [47 USCS § 332(c)], except to the extent that the Commission finds that such service should be included in the definition of such term.

(27) Mobile service. The term "mobile service" means a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any

service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding.

. . .

(29) Network element. The term "network element" means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

. . .

(32) Person. The term "person" includes an individual, partnership, association, joint-stock company, trust, or corporation.

(33) Radio communication. The term "radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

. . .

(35) Radio station. The term "radio station" or "station" means a station equipped to engage in radio communication or radio transmission of energy.

. . .

(40) State. The term "State" includes the District of Columbia and the Territories and possessions.

(41) State commission. The term "State commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.

. . .

(43) Telecommunications. The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(44) Telecommunications carrier. The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 [47 USCS § 226]). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether

the provision of fixed and mobile satellite service shall be treated as common carriage.

(45) Telecommunications equipment. The term "telecommunications equipment" means equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades).

(46) Telecommunications service. The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

(47) Telephone exchange service. The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

(48) Telephone toll service. The term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

(49) Television service.

(A) Analog television service. The term "analog television service" means television service provided pursuant to the transmission standards prescribed by the Commission in section 73.682(a) of its regulations (47 C.F.R. 73.682(a)).

(B) Digital television service. The term "digital television service" means television service provided pursuant to the transmission standards prescribed by the Commission in section 73.682(d) of its regulations (47 C.F.R. 73.682(d)).

(50) Transmission of energy by radio. The term "transmission of energy by radio" or "radio transmission of energy" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission.

(51) United States. The term "United States" means the several States and Territories, the District of Columbia, and the possessions of the United States, but does not include [the Philippine Islands or] the Canal Zone.

(52) Wire communication. The term "wire communication or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things,

the receipt, forwarding, and delivery of communications) incidental to such transmission.

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
COMMON CARRIERS
COMMON CARRIER REGULATION

47 USCS § 201 (1998)

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: Provided, That communications by wire or radio subject to this Act [47 USCS §§ 151 et seq.] may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different

charges may be made for the different classes of communications: Provided further, That nothing in this Act [47 USCS §§ 151 et seq.] or in any other provision of law shall be construed to prevent a common carrier subject to this Act [47 USCS §§ 151 et seq.] from entering into or operating under any contract with any common carrier not subject to this Act [47 USCS §§ 151 et seq.], for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: Provided further, That nothing in this Act [47 USCS §§ 151 et seq.] or in any other provision of law shall prevent a common carrier subject to this Act [47 USCS §§ 151 et seq.] from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act [47 USCS §§ 151 et seq.].

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
COMMON CARRIERS
COMMON CARRIER REGULATION

47 USCS § 202 (1998)

§ 202. Discriminations and preferences

(a) Charges, services, etc. It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included. Charges or services, whenever referred to in this Act [47 USCS §§ 151 et seq.], include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty. Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $ 6,000 for each such offense and $ 300

for each and every day of the continuance of such offense.

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
COMMON CARRIERS
COMMON CARRIER REGULATION

47 USCS § 203 (1998)

§ 203. Schedules of charges

(a) Filing; public display. Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act [47 USCS §§ 151 et seq.] when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements.

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates. No carrier, unless otherwise provided by or under authority of this Act [47 USCS §§ 151 et seq.], shall engage, or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act [47 USCS §§ 151 et seq.] and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or

facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal. The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations. In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $ 6,000 for each such offense, and $ 300 for each and every day of the continuance of such offense.

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
COMMON CARRIERS
COMMON CARRIER REGULATION

47 USCS § 206 (1998)

§ 206. Carriers' liability for damages

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this Act [47 USCS §§ 151 et seq.] prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act [47 USCS §§ 151 et seq.] required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act [47 USCS §§ 151 et seq.], together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
COMMON CARRIERS
COMMON CARRIER REGULATION

47 USCS § 207 (1998)

§ 207. Recovery of damages

Any person claiming to be damaged by any common carrier subject to the provisions of this Act [47 USCS §§ 151 et seq.] may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act [47 USCS §§ 151 et seq.], in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

APPENDIX C - SELECTED PORTIONS OF COPYRIGHT LAWS OF THE UNITED STATES, 17 U.S.C. § 101 et seq.

TITLE 17. COPYRIGHTS
CHAPTER 1. SUBJECT MATTER AND SCOPE OF COPYRIGHT

17 USCS § 101 (1998)

§ 101. Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

An "architectural work" is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The "Berne Convention" is the Convention for the Protection of Literary and Artistic Works, signed at

Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.

The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

A person's "children" are that person's immediate offspring, whether legitimate or not, and any children legally adopted by that person.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

"Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

For purposes of section 411, a work is a "United States work" only if—

1) in the case of a published work, the work is first published--

(A) in the United States;

(B) simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;

(C) simultaneously in the United States and a foreign nation that is not a treaty party; or

(D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;

(2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in, the United States; or

(3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

A "device", "machine", or "process" is one now known or later developed.

A "digital transmission" is a transmission in whole or in part in a digital or other non-analog format.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

An "establishment" is a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

A "food service or drinking establishment" is a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The "Geneva Phonograms Convention" is the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, concluded at Geneva, Switzerland, on October 29, 1971.

The "gross square feet of space" of an establishment means the entire interior space of that establishment,

and any adjoining outdoor space used to serve patrons, whether on a seasonal basis or otherwise.

The terms "including" and "such as" are illustrative and not limitative.

An "international agreement" is—

(1) the Universal Copyright Convention;

(2) the Geneva Phonograms Convention;

(3) the Berne Convention;

(4) the WTO Agreement;

(5) [Caution: This paragraph takes effect upon the entry into force of the WIPO Copyright Treaty with respect to the United States, as provided by § 105(b)(1) of Act Oct. 28, 1998, P.L. 105-304, which appears as a note to this section.] the WIPO Copyright Treaty;

(6) [Caution: This paragraph takes effect upon the entry into force of the WIPO Performances and Phonograms Treaty with respect to the United States, as provided by § 105(b)(2) of Act Oct. 28, 1998, P.L. 105-304, which appears as a note to this section.] the WIPO Performances and Phonograms Treaty; and

(7) any other copyright treaty to which the United States is a party.

A "joint work" is a work prepared by two or more authors with the intention that their contributions be

merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

A "performing rights society" is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds

can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

A "proprietor" is an individual, corporation, partnership, or other entity, as the case may be, that owns an establishment or a food service or drinking establishment, except that no owner or operator of a radio or television station licensed by the Federal Communications Commission, cable system or satellite carrier, cable or satellite carrier service or programmer, provider of online services or network access or the operator of facilities therefor, telecommunications company, or any other such audio or audiovisual service or programmer now known or as may be developed in the future, commercial subscription music service, or owner or operator of any other transmission

service, shall under any circumstances be deemed to be a proprietor.

The term "financial gain" includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.

A "pseudonymous work" is a work on the copies or phonorecords of which the author is identified under a fictitious name.

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

To perform or display a work "publicly" means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

"Registration", for purposes of sections 205(c)(2), 405, 406, 410(d), 411, 412, and 506(e), means a registration of a claim in the original or the renewed and extended term of copyright.

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

"State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A "transmission program" is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

A "treaty party" is a country or intergovernmental organization other than the United States that is a party to an international agreement.

The "United States", when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article".

The author's "widow" or "widower" is the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried.

[Caution: This subdivision takes effect upon the entry into force of the WIPO Copyright Treaty with respect to the United States, as provided by § 105(b)(1) of Act Oct. 28, 1998, P.L. 105-304, which appears as a note to this section.] The "WIPO Copyright Treaty" is the WIPO Copyright Treaty concluded at Geneva, Switzerland, on December 20, 1996.

[Caution: This paragraph takes effect upon the entry into force of the WIPO Performances and Phonograms Treaty with respect to the United States, as provided by § 105(b)(2) of Act Oct. 28, 1998, P.L. 105-304, which appears as a note to this section.] The "WIPO

Performances and Phonograms Treaty" is the WIPO Performances and Phonograms Treaty concluded at Geneva, Switzerland, on December 20, 1996.

A "work of visual art" is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

(A) (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of that person's official duties.

A "work made for hire" is—

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

The terms "WTO Agreement" and "WTO member country" have the meanings given those terms in paragraphs (9) and (10), respectively, of section 2 of the Uruguay Round Agreements Act [19 USCS § 3501].

TITLE 17. COPYRIGHTS
CHAPTER 1. SUBJECT MATTER AND SCOPE OF COPYRIGHT

17 USCS § 102 (1998)

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works;

(7) sound recordings; and

(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

TITLE 17. COPYRIGHTS
CHAPTER 1. SUBJECT MATTER AND SCOPE OF COPYRIGHT

17 USCS § 106 (1998)

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 120, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

TITLE 17. COPYRIGHTS
CHAPTER 2. COPYRIGHT OWNERSHIP AND TRANSFER

17 USCS § 201 (1998)

§ 201. Ownership of copyright

(a) Initial ownership. Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.

(b) Works made for hire. In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

(c) Contributions to collective works. Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

(d) Transfer of ownership.

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

(e) Involuntary transfer. When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.